

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS EXZAVER AUSTIN,

Defendant and Appellant.

C084624

(Super. Ct. No. CR20139308)

In this appeal, defendant Dennis Exzaver Austin challenges the trial court's denial of his *Romero*¹ motion to strike one or both of his prior strikes. We will affirm.

BACKGROUND

A jury found defendant guilty of two counts of first degree burglary (Pen. Code, § 459),² and single counts of misdemeanor battery (§ 242), attempted destruction of

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

evidence (§§ 664/135), misdemeanor vandalism (§ 594, subd. (a)), and attempted first degree burglary (§§ 664/459). The trial court also found numerous enhancements true based on prior prison terms and convictions — including two prior strikes for a 2010 first degree burglary conviction and a 2008 criminal threats conviction.

At sentencing, defendant moved to strike his prior strikes. In support, defendant testified that he suffered from a drug addiction most of his life. Further, he had testified in a case involving the homicide of a child — and did so “without any deal with the prosecution for consideration or reduction of sentence and with the motivation to ‘do the right thing.’ ” As a result of his testimony he had been labeled a snitch and threatened with violence.

The trial court declined to strike either strike. It noted it had found nothing in the probation report or other supporting documents to place defendant outside of the spirit of the three strikes law. Defendant’s criminal history is lengthy. His prior offenses consist of 14 felony convictions, 12 misdemeanors, and 5 violations of parole or probation spanning from 2000 to 2013 — his current offenses occurred in 2013. As to defendant’s history of drug addiction, the court noted defendant had previously been sentenced to a treatment facility but had not shown up.

As to defendant’s testimony in the murder case, the court noted defendant had done so with no promises made to him. But to now bring that testimony forward as a reason to strike his prior strikes undercuts his assertion that he had testified purely for altruistic reasons.

The trial court imposed an aggregate indeterminate term of 75 years to life along with a 10-year determinate term.

² Undesignated statutory references are to the Penal Code.

DISCUSSION

On appeal, defendant challenges the denial of his *Romero* motion. He argues his case falls outside the three strikes sentencing scheme, and thus the denial was an abuse of discretion. He points to his drug addiction, noting his prior offenses fit a pattern of addiction. He maintains his present offenses were less serious because he committed daytime residential burglaries in order to avoid possible confrontation and violence. He avers none of his past offenses were “violent felonies” as defined by section 667.5, subdivision (c). He notes he would still face a substantial sentence absent one or both strikes. And as he is 34 years old and suffers from renal failure, the denied *Romero* motion represents a de facto life sentence. Finally, he maintains the most glaring aspect of the denial was the refusal to recognize his voluntary cooperation with the prosecution in a case involving the murder of an infant. We disagree.

The three strikes sentencing scheme applies where the defendant has at least one qualifying strike, unless the trial court concludes an exception should be made. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) A trial court properly exercises its discretion in striking a strike only if it finds “in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects,” the defendant falls outside the law’s spirit and should be treated as though he had not committed the prior strike. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

When a trial court declines to strike a strike, we review that decision for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at pp. 374-375.) We will not reverse “unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) Where the court, aware of its discretion, “ ‘balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the . . . ruling, even if we might have ruled differently’ ” (*Id.* at p. 378.)

Here, the trial court acted within its discretion in denying defendant's motion to strike his prior strikes. Defendant's lengthy criminal record and his current offenses place him squarely within the spirit of the three strikes law. As the trial court noted, any mitigating effect of defendant's drug addiction is undermined by his failure to take advantage of a treatment opportunity. And though defendant emphasizes that none of his offense were enumerated violent felonies, his two prior strikes undercut that argument. Further, the fact that his current burglaries occurred in the daytime does little to render them less serious: the time could have been chosen to avoid detection rather than to minimize the risk to the victims.

Finally, the fact that defendant testified in a separate criminal matter does not render the trial court's ruling an abuse of discretion given defendant's long criminal history and numerous present offenses. As the trial court noted, the fact that defendant offered testimony for purely altruistic reasons (though laudable) is brought into question by his current expectation of concession for that testimony. Similarly, defendant's medical condition and the fact that he would still face a substantial sentence absent one or both strikes, does not place him outside the spirit of the three strikes law.³

The trial court acted within its discretion in denying the motion.

DISPOSITION

The judgment is affirmed.

³ Defendant's reliance on *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1216 is misplaced. There, the trial court found the failure to strike one of two prior strikes an abuse of discretion and noted it is appropriate to consider the potential term a defendant may receive in determining whether to strike a strike. Critically however — and unlike here where the strikes were separated by at least a year — in *Burgos* the strikes arose from the same act. (See *id.* at p. 1216 [“Here, appellant's two prior convictions, attempted carjacking and attempted robbery, were, in the language of [*People v.*] *Benson* [(1998) 18 Cal.4th 24], ‘so closely connected,’ having arisen from the same single act, that failure to strike one of them must be deemed an abuse of discretion.”].)

/s/
Blease, Acting P. J.

We concur:

/s/
Hull, J.

/s/
Murray, J.